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No. 89-851 (3)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

UNITED STATES FOOTBALL LEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Reply Brief in Support of Petition For a Writ of Certiorari

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In rejecting the "heart" of the USFL's case, its television claims, and awarding the USFL only $1 in damages, the jury in this case found that the USFL should not be rewarded for its own self-destruction and improper attempt to force a merger with the NFL, including the very filing of this lawsuit. The Second Circuit's affirmance of an attorney's fee award as "reasonable" that is 5.5 million times the result obtained in effect nullifies the jury's verdict and is totally inconsistent with the Second Circuit's own opinion on the merits of this case. *See USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988).

As a result of the Second Circuit's opinion, prospective plaintiffs like the USFL will make litigation decisions in large part based upon the likelihood and extent of their recovery of attorney's fees. If windfall fees are too readily available, lawsuits that are at best marginal and at worst brought for improper purposes will proliferate.

On the other hand, defendants may face a Hobson's choice: litigate and face the possibility of shouldering enormous attorney's fees even if plaintiff achieves only a nominal result, or pay an extortionate settlement to avoid the uncertainty of an irrational attorney's fee award that is a substitute for the jury's rejection of the plaintiff's claims on the merits. As demonstrated in the Petition, there will be no diminution of the effective encouragement of private litigation under fee-shifting statutes such as Section 4 of the Clayton Act by a rule of law that requires a rational relationship between an attorney's fee award and the results obtained. Respondents' opposition brief completely ignores these serious policy issues.

In addition, the USFL's suggestion that review of this case would require the Court to engage in "scouring a 12,000-page record" (Respondent's Brief in Opposition ("Opp. Br.") at 18) is wrong. This Court need look no further than the Second Circuit's merits opinion to see that the fee award is manifestly unjust. The issues raised in the Petition are unresolved

and controversial questions of law, not matters of fact requiring *de novo* review by the Court.

The requirements that a fee award (i) be rationally related to the result obtained; (ii) reflect the plaintiffs' improper motive in bringing the action; (iii) meet the *Hensley* "prevailing party" standard in a private antitrust case; (iv) not be made unless a plaintiff proves damages as required by Section 4 of the Clayton Act; and (v) not reimburse a plaintiff for time devoted to failed claims where he has obtained only paltry results are all questions of law, not fact. Petitioners respectfully submit that these legal questions were decided incorrectly below by the district court and the Second Circuit.

ARGUMENT

As demonstrated below, the Petition presents important questions of public policy that should be resolved by this Court.

1. There Must Be A Rational Relationship Between Any Attorney's Fee Award And The Result Obtained

In the Petition, the NFL demonstrated that in all cases in which a fee-shifting statute is involved, there must be a rational relationship between the fee award and the result obtained (NFL Cert. Petition at 9-13).[2] In a series of decisions, this Court has sought to prevent the award of windfall attorney's fees. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). And in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), Justice Powell's controlling concurrence stressed that, when making a fee award, the court *must* "give primary consideration to the amount of damages awarded as compared to

[2] Citation to the National Football League's Petition for A Writ of Certiorari is in the form: NFL Cert. Petition at .

the amount sought." *Id.* at 585. The USFL ignores this consistent Supreme Court authority.[3]

The USFL argues that the district court applied the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and that of these factors only "the results obtained, pointed to a lower than maximum fee award" (Opp. Br. at 16). According to the USFL, the twenty percent reduction selected by the district court is beyond review merely because it purportedly reflected the court's discretion (Opp. Br. at 16). This argument suggests that this Court should never have reviewed the *Hensley*, *Blum*, or *Delaware Valley* cases.

The USFL's reliance on the factors set forth in *Johnson* is misplaced (Opp. Br. at 16). In *Hensley*, this Court held that almost all of "these [*Johnson*] factors usually are subsumed" in the lodestar. 461 U.S. at 434 n.9. The Court emphasized that "the [calculation of the lodestar] does not end the inquiry." *Id.* at 434. Where, as here, the plaintiff has only a partial or limited success, *Hensley* teaches that the fee *must* be adjusted downward:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a law-

[3] The USFL's argument that the Court should reject the Petition because the NFL did not make such an argument in the lower courts (Opp. Br. at 15-16) is wrong. Both in the district court and in the Second Circuit, the NFL maintained that *Riverside* mandates that the court, in determining an attorney's fee, set a rational or proportionate relationship between the amount of damages recovered and the fee to be awarded. *See* Brief for Defendants-Appellants NFL at 32-35, filed in *USFL v. NFL*, 887 F.2d 408 (2d Cir. 1989); Brief for Defendants NFL at 35-36, filed in *USFL v. NFL*, 704 F. Supp. 474 (S.D.N.Y. 1989). In this case, such a relationship would lead to an award of no fees or a nominal award.

> suit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Id. at 436.

Petitioners respectfully submit that this Court should make clear that the downward adjustment *must* have a rational relationship to the degree of success obtained.

In making its strained argument, the USFL incorrectly suggests that it is absurd for the NFL to argue that "the result is what matters" (Opp. Br. at 17). But this is not the NFL's statement; it is this Court's in *Hensley*. 461 U.S. at 435. Indeed, the result obtained is "particularly crucial" where, as here, a plaintiff unquestionably has "succeeded on only some of his claims for relief" (*id.* at 434), and his claims are not "interrelated, non-frivolous [or] raised in good faith." *Id.* at 436. The Second Circuit's affirmance of an award bearing no rational relationship to the results obtained thus ignores *Hensley*.

Finally, that the fee award should bear a rational relationship to the result obtained simply echoes the language of Section 4 of the Clayton Act that a prevailing antitrust plaintiff shall recover a "reasonable" attorney's fee. A "reasonable" fee means reasonable in relation to the result obtained. *See Hensley*, 461 U.S. at 432-36. Any quarrel with this truism can only posit that the relationship should not be rational—surely a position unsupported by the language of Section 4 and *Hensley* but nevertheless advanced by the USFL and, apparently, accepted by the courts below.

2. The USFL's Bad Faith And Improper Motive In Bringing Suit Should Have Been Considered By The Courts Below

In the Petition, the NFL showed that when making the attorney's fee award, the courts below ignored their own factual findings that the USFL had brought this action in bad faith and to force a merger with the NFL (NFL Cert. Petition at 13-14). The USFL does not contest that such findings were made by the courts below. Rather, the USFL simply reiter-

ates that it suffered an injury and argues that its improper motives "are relevant only to the extent they negate either injury or damage causation" (Opp. Br. at 13-14). The USFL also argues that the jury finding of antitrust injury shows that it considered and rejected the NFL's "mismanagement" and "merger motive" evidence and that, therefore, "there is no factual predicate for the NFL's arguments with respect to the USFL's motives." *Id.*

These arguments fly in the face of the jury's verdict and Second Circuit's merits holding. With respect to the relevance of this evidence, the Second Circuit noted that "[c]ourts do not exclude evidence of a victim's suicide in a murder trial," *USFL v. NFL*, 842 F.2d at 1370, and that evidence of the USFL's self-destructive merger strategy was properly admissible not only on causation issues but also on damages issues. Accordingly, mismanagement and merger motive evidence was properly admitted at trial and "was highly probative on the central issue of whether the USFL's alleged injury and damages . . . were caused by the NFL's anticompetitive conduct or by the USFL's own deliberate business judgments." *Id.* at 1369.

Because the attorney's fee award is part of the damages remedy (*see, e.g., Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404, 411 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989)), the court should have considered this evidence when making the fee award, particularly since the jury so clearly considered it in determining to award only nominal damages. Thus, it is once again "frivolous" for the USFL to suggest that this evidence constitutes "*in pari delicto*" evidence that the court was prohibited from considering in the fee determination. *See USFL v. NFL*, 842 F.2d at 1369.

3. Time Devoted To Claims Which Are Dismissed Before Trial Or Rejected At Trial Should Not Be Compensable

In the Petition, the NFL showed that the Second Circuit's award of fees to the USFL for time devoted to its rejected television case, claims dismissed before trial, state law claims, and other irrelevant, collateral matters was improper because

these matters could not have contributed to its verdict (NFL Cert. Petition at 14-15).

The USFL does not contest this showing by the NFL. Rather, it merely repeats the statement by the courts below that the television claims were related to the general claim of monopolization (Opp. Br. at 18). This is irrelevant. Even with respect to the rejected television case, no damages could have flowed from the NFL's television related conduct because it was legal and, therefore, the television evidence could only illuminate legal conduct because it was itself legal. Moreover, far from being required to "devote its limited resources to scouring a 12,000-page record to reconsider lower court determinations of issues" (Opp. Br. at 18), this Court faces a pure question of law: whether attorney's fees should be awarded for time spent on a damages case that is entirely and thoroughly rejected by the jury and therefore cannot have contributed to a verdict on other distinct issues.[4]

4. Attorney's Fees Should Not Be Awarded To A Plaintiff Which Proves Violation And Injury But Fails To Prove Damages

In the Petition, the NFL showed that the Second Circuit's holding that a finding of injury is all that is required for an award of attorney's fees under Section 4 is contrary to case law, the plain meaning of the Clayton Act and congressional intent (NFL Cert. Petition at 16-18). To recover under Section 4, plaintiff must prove an amount of damages attributable to the violation and antitrust injury found by the jury.

[4] The USFL claims that the NFL's challenge is "flawed" because the NFL "did not identify any time devoted exclusively to these allegedly non-compensable activities" (Opp. Br. at 17-18). The USFL is wrong because (a) the USFL, not the NFL, bore the burden of establishing which hours were successfully spent (*see Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1215 (3d Cir. 1978) ("plaintiff bears the burden of proving what hours were devoted to [successful] claim[s]"); and (b) as the NFL showed below, and as the courts below recognized (*see USFL v. NFL*, 704 F. Supp. 474, 477 (S.D.N.Y.), *aff'd*, 887 F.2d 408 (2d Cir. 1989)), the USFL's time records were too vague to permit the parsing which it now invites.

The USFL fails entirely to address any of the arguments and cases set forth by the NFL. It continues to confuse proof of injury with proof of damages. The USFL incorrectly asserts that to recover attorney's fees under Section 4 "[a]ll that is required is an injury" and that there is "no basis for the NFL's argument that proof of damages is yet an additional requirement" (Opp. Br. at 2, 12). Section 4 necessarily requires proof of "damages in some amount susceptible of expression in figures." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 909 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). An antitrust defendant is entitled to a directed verdict where the plaintiff fails to prove damages. *Id.* Here the USFL does not dispute what the Second Circuit suggested: that the $1 verdict was the equivalent of no damages at all. *See USFL v. NFL*, 842 F.2d at 1377.

Finally, the Petition demonstrated that the USFL failed miserably in its attempt to prove damages flowing from the only violation found by the jury. The USFL does not contest this fact. Having failed to prove damages, the USFL should not have recovered any fees under Section 4.

5. Attorney's Fees Should Not Be Awarded To A Plaintiff Which Is Not A Prevailing Party Under *Hensley*

The Petition showed that the prevailing party standard set forth in *Hensley* applies in antitrust cases and civil rights cases alike, and that the courts below erred by declining to apply it to this case (NFL Cert. Petition at 18-19).

The USFL argues that because the term "prevailing party" does not appear in Section 4 and because the Clayton Act is a mandatory statute, the standard is inapplicable to antitrust cases (Opp. Br. at 12). This argument ignores this Court's statements in *Hensley* and in *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486 (1989), as well as the court's thorough analysis of this issue in *Reazin v. Blue Cross & Blue Shield, Inc.*, 663 F. Supp. 1360, 1449-50 (D. Kan. 1987). *See* NFL Cert. Petition at 18-19.

6. This Petition Presents Important Questions Of Federal Antitrust Law

The Petition explained that to discourage plaintiffs from filing broadly alleged and poorly grounded treble damage actions seeking anticompetitive results, there must be some limit upon the award of attorney's fees to parties that obtain *de minimis* results (NFL Cert. Petition at 19-20). Failure to develop such limits causes great harm, straining limited judicial resources and deterring parties from engaging in what may well be procompetitive behavior. The benefit of such suits, by contrast, is negligible at best.

The USFL does not address these important policy concerns. The NFL respectfully submits that where, as here, the plaintiff brings suit in bad faith to force an anticompetitive merger and has eight of its nine claims rejected, including the conceded "heart" of its case, is awarded only $1 in damages and denied any injunctive relief, that plaintiff should not be given a windfall attorney's fee award. Paying such a high price for private enforcement of the antitrust laws could not have been contemplated by Congress and should not be condoned by the judicial system.

CONCLUSION

For the reasons demonstrated above and in the NFL's Petition for a Writ of Certiorari, a Writ of Certiorari to review the decision of the Second Circuit should issue.

Dated: January 8, 1990

Respectfully submitted,

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